SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,
Plaintiffs-Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, *Defendant-Respondent,*

and

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH and BARBARA BRENNAN, *Intervenor-Defendants-Respondents.*

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Motion For Leave to File Brief Amicus Curiae of the Attorney General on Behalf of the State of New Mexico, and Brief Amicus Curiae

BOSTON E. WITT
Attorney General

MYLES E. FLINT
Assistant Attorney General

Attorneys for New Mexico

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL ON BEHALF OF THE STATE OF NEW MEXICO

The Attorney General of The State of New Mexico respectfully moves for leave to file a brief *amicus curiae.* In support of such motion, he states as follows:

I.

The primary issue involved in this cause concerns the validity of a New York Law authorizing the purchase and distribution by appropriate state officials of textbooks to persons enrolled in private schools. Education Law, § 701(2), New York Laws 1965, Ch. 320. This law is challenged as being contrary to the First and Fourteenth Amendments of the United States Constitution.

II.

The State of New Mexico pursuant to Section 77-13-7, N.M.S.A., 1953 Compilation (P.S.) provides free instructional material to students enrolled in public and private schools in a manner similar to that followed by the New York Law now under attack.

III.

There are currently 18,139 students enrolled in private institutions in the State of New Mexico who receive free instructional materials or approximately six percent of the 286,706 enrolled in schools in the state after the first twenty days of the current academic year began.

IV.

The outcome of the current case could have far reaching effects upon the schools and children of this state and the state therefore is directly and vitally concerned by the attack upon the New York law.

V.

The Appellants in their jurisdictional statement cite the case of *Zellers* v. *Huff*, 55 N.M. 501, 236 P. 2d 949

(1951) and state that this case held that the New Mexico textbook law was unconstitutional and if this position is left unchallenged, it too could have far reaching effects upon the schools and children of this state.

WHEREFORE, for the foregoing reasons, the Attorney General on behalf of the State of New Mexico moves for leave to file a brief *amicus curiae* in this cause, and for all other proper relief in the premises.

Respectfully submitted,

/s/ BOSTON E. WITT
Boston E. Witt
Attorney General

/s/ MYLES E. FLINT
Myles E. Flint
Assistant Attorney General

Attorneys for New Mexico

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BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF NEW MEXICO

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in motion to which this brief is attached. The Opinions Below, Jurisdiction and Statement are set forth in Appellant's Jurisdictional Statement and will not be duplicated here.

QUESTION INVOLVED

Does a statute providing for the loan of textbooks to pupils in both public and non-public schools violate any provisions of the First Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Education Law, Section 701 (2), as amended by New York Laws 1965, Chapter 320:

> "In the several cities and school districts of the state, boards of education, trustees or such body or officers as perform the function of such boards shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. Text-books loaned to children enrolled in grades seven to twelve of said private schools shall be text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities."

POINT I

A statutory provision for the loan of textbooks to pupils of both public and non-public schools does not violate the provisions of the United States Constitution

It is Appellant's position that the furnishing of textbooks to pupils in both public and private schools violates the First Amendment of the United States con-

stitution in that it involves the use of tax moneys in aid of sectarian schools and constitutes the establishment of religion as that term is used in the First Amendment. We would submit that to the contrary such an act does not violate the provisions of the Constitution. It is neither the use of public moneys in aid of sectarian schools nor does it constitute the establishment of religion or tend to prevent the free exercise of religion as set forth in the First Amendment.

In support of our position we cite the court to *Everson* v. *Board of Education,* 330 U.S. 1. (1947). That case involved the question whether reimbursement to parents of money expended by them for the bus transportation of their children to parochial schools was contrary to the provisions of the First Amendment of the United States Constitution. In its decision this court concluded that such a payment was not unconstitutional. In reaching its conclusion the court gave two basic reasons for its decision. First it stated that a state has the power to promulgate acts for the general well being of the public. In such cases the Supreme Court is hesitant to overrule the actions of the state legislature. After a consideration of the bus transportation law in question, the court concluded that this was a legitimate public purpose with a benefit to the community and that, therefore, it caused no problems constitutionally.

The court then proceeded to a discussion of the meaning "establishment of religion" as that term is used within the Constitution. There the court concluded that it at least was intended to create a wall of separation between church and state. Having reached that conclusion it then examined the effect of reimburse-

ment for bus transportation in that light. It was stated that such payment for bus transportation *would indirectly assist* students to church schools but in interpreting the act of the New Jersey Legislature the court had to be careful not to inadvertently prohibit New Jersey from extending its general state law benefits to all of its citizens without regard to their religious belief. It was stated that the role of the state with regard to religion must be neutral and not adversarial. The court then held that payment for such transportation did not violate the provisions of the Constitution because this did not involve state aid to parochial schools but was a general program to assist the parent and pupil without regard to religion. In other words, it would seem that if the purpose of the law is secular and any benefit to religion is only incidental the law would not be unconstitutional.

It is our belief that if the pupil textbook law as enacted in New York is construed or examined in the light of the pronouncements contained in the *Everson* case, *supra*, it is clear that this law is valid for the same reason that the bus transportation law under consideration in *Everson, supra,* was held valid.

The question is whether a textbook law which provides that governing bodies of various school districts may purchase and loan textbooks to all children residing in the district whether they are enrolled in public or private schools is an act which is for the *general public welfare.* In most states, laws have been enacted which require compulsory attendance at school for children up to certain ages. Undoubtedly the purpose of the compulsory attendance law is to insure that all children will receive an education on the theory that the

education of these children will be for the general public welfare of the community as well as for the benefit of the individual child. Most states further have laws which recognize that this education which is held to be a desirable goal may be attained in either public or private institutions. From this it is not difficult to conclude that the education of the child whether it be in public or private school is a desirable public goal.

Furthermore, it should be noted that the laws with regard to compulsory attendance of schools are applicable to all children. There is no attempt to distinguish under such laws between those students who attend public schools and those students who attend private schools. Certainly there is no distinction drawn between the students on religious grounds as each child's education is of great public importance as that of another.

The textbook law under consideration provides for free textbooks to all students living within the districts who attend schools which have been accredited by the proper authority has the same general purpose as the compulsory school attendance law. The purpose of the compulsory school law is to require a minimum level of education of all children within the state. By establishing methods of the accreditation of schools the legislators recognized the need for standards beyond simple school attendance to insure that the ultimate goal of education of the child is obtained. The school textbook law is merely an extension of the same concept. By establishing recognized textbooks and making them available to all students whether attending public or private schools the state is indicating and

taking action commensurate with its interest that all students should be required to attend recognized schools wherein they receive a basic level education. The benefits to be derived from the implementation of the textbook law is twofold. The general public receives a benefit in that the general level of education within the system will improve pursuant to the implementation of the act. The individual child will benefit from the textbook law in that he or she will have at his disposal the best available material from which to continue his education.

It is true that schools may indirectly be benefited by the use of free textbooks. But, as was stated in *Everson*, this is not contrary to the Constitution. The purpose of the law is secular. The benefit to be derived directly from the law inures to the child or student. The only benefit to the school is indirect. Applying the test as announced in *Everson*, that the textbook law involved here has a benefit to the general public and to the pupil, who is the recipient of the textbooks, that the state program is secular in purpose and the benefit to the school is only incidental and indirect, we conclude that the law does not violate the provisions of the First Amendment of the United States Constitution.

In New Mexico under Section 77-13-7; N.M.S.A., 1953 Compilation (1967 P.S.) any student attending a school approved by the State Board of Education pursuant to the compulsory school attendance law whether it be public or private is entitled to free use of instructional materials. As in New York the beneficiary of the enactment is the child and the child is chosen without regard to religion or comment thereon. The law provides that the loan is to the student and not to the

school. Any child attending a school that meets the minimum requirements established by the State Board of Education is entitled to these materials. It is our contention that the law in New Mexico is valid for the same reasons as set forth above for upholding the validity of the New York law. Clearly in New Mexico where six per cent of the total school population or 18,139 students as of the beginning of the 1967-68 school year attend private schools, the importance of the programs permitted under the school textbook law are of great magnitude. The general benefits accruing to the populace of this state are manifold. New Mexico has large areas where the population is poor, the level of education among the population is low and large scale unemployment exists. Laws, such as the free textbook law, are directed towards improving the picture in these places. It is unquestionably valid to state that one method of improving the lot of these persons is through education. To hold laws such as these invalid will certainly make it extremely difficult to carry forward programs of great public interest.

It is our understanding that in the jurisdictional statement filed by Appellants, it is alleged that the question presented to the court in this cause has been considered by the Supreme Court of the State of New Mexico and a conclusion has been reached that a statute providing for textbooks for students has been held to be unconstitutional. We would respectfully point out that the present school textbook law in the State of New Mexico was enacted in 1967 and that there has been no litigation over this particular enactment. *Zellers* v. *Huff*, 55 N.M. 501, 236 P. 2d 949 (1951) did comment on a related question. However, it should be made clear that the question presented in that cause

concerned a different legislative enactment which provided free textbooks for both public and private schools. That law has been repealed.

CONCLUSION

In conclusion, we respectfully submit that the New York law involved should be found constitutional and the decision of the Court below affirmed.

Respectfully submitted,

BOSTON E. WITT
Attorney General

MYLES E. FLINT
Assistant Attorney General

Attorneys for Amicus Curiae, New Mexico